SEP 12 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

ELIZABETH MORGAN,
Petitioner,

vs.

MILTON C. POTTER, Superintendent of Milwaukee Public Schools of the City of Milwaukee,
Respondent.

No. 607

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

A. W. RICHTER,
Counsel for Petitioner.

HAMMERSMITH-KORTMEYER CO., MILWAUKEE

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To the Chief Justice of the United States and Associate Justices of the Supreme Court of the United States:

Elizabeth Morgan respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Wisconsin affirming a judgment of the Circuit Court of Milwaukee County, which denied petitioner a writ of mandamus and dismissed her petition on the merits.

SUMMARY STATEMENT OF MATTERS INVOLVED

Petitioner filed her petition in the Circuit Court of Milwaukee County based upon the allegations that she had been a teacher in the public schools in the City of Milwaukee since 1889, and that, by virtue of the Teachers' Tenure Law of the State of Wisconsin relating to cities of the first class (Section 925 xx (17), and Section 42.55 (18) Statutes of Wisconsin), she had obtained permanent tenure, that the respondent as superintendent of schools of the City of Milwaukee had, in violation of law, refused to assign her to work or to permit her to perform h duties as a teacher.

An alternate writ of mandamus was issued and respondent, by his answer and return to the alternative writ, alleged that petitioner was retired by reason of the fact that she became seventy years of age on October 5, 1938 and that such retirement was under the provisions of Chapter 160 Laws of 1937 of the State of Wisconsin (Section 42.55(12)(K) Statutes of Wisconsin); respondent further alleged that petitioner's services had been satisfactory and that no cause for removal or discharge existed other than by virtue of the terms of Chapter 160 Laws of 1937 of Wisconsin (Section 42.55 (12) (K) Statutes of Wisconsin). He also alleged that in 1909 petitioner became a member of the Milwaukee School Teacher's Annuity and Retirement Fund and that there had been deducted from her salary monthly payments of $2.00 for said fund. (R. 12).

A trial was had before the court at which petitioner urged the invalidity of Chapter 160 Laws of 1937 of Wisconsin (Sec. 42.55(12)(K) Statutes of Wisconsin) because it violates the contract clause of the Constitution of Wisconsin (Article 1, Section 12 Constitution of Wis-

consin,) and Article 1, Section 10, of the Constitution of the United States.

The Trial Court denied the petition and the relief prayed for and filed a written decision (R. 42) and decided that the Statute in question did not impair a contract of petitioner with the City of Milwaukee and did not violate Article 1, Section 12 of the Constitution of the United States.

The Court also filed findings of fact and conclusions of law (R. 50) in which it determined that the Board of School Directors of Milwaukee properly terminated the services of petitioner pursuant to the provisions of Section 42.55(12)(K) and that her services were not terminated by reason of any inefficiency or misbehavior as provided in Sec. 42.55(18) of the Statutes of Wisconsin and that Section 42.55(12)(K) of the Statutes of Wisconsin fixing the compulsory retirement age at seventy is constitutional and does not violate the Constitution of Wisconsin and, more particularly, that it does not violate the provisions of Article 1, Section 10 of the United States Constitution.

The Supreme Court of Wisconsin, the highest court in the State, affirmed the judgment upon the grounds set forth in the written opinion (R. 105 et seq.)

Morgan vs. Potter, — Wis. —, 298 N.W. 763.

Sec. 925 xx (17) of the Statutes of 1919 of Wisconsin, under which petitioner acquired her tenure, is as follows:

> "All elections or appointments of teachers by the board of school directors or other managing bodies in cities of the first class shall be on probation, and after a successful probation for four years, the election or appointment shall be permanent, during efficiency or good behavior, provided that teachers

> having taught four years or more in cities to which this act applies shall be deemed to have served their term of probation. No teacher who has become permanently employed as herein provided by reason of four or more years of continuous service shall be discharged, except for cause upon written charges, which shall after ten days' written notice thereof to such teacher, upon such teacher's written request, be investigated, heard and determined by the board of school directors, whose action and decision in the matter shall be final."

The present statute, Sec. 42.55(18) Statutes of Wisconsin, is the same as the foregoing except that the period of probation has been changed from four to three years.

Section 925 xx was Chapter 510, Laws of Wisconsin of 1909. It established Wisconsin's first Teachers' Annuity and Retirement Fund. As to all teachers then in the service membership in it was voluntary.

Petitioner filed an application and became a member. She remained such up to the time of her removal.

In 1937 an amendment was added to the Statutes, as Section 42.55(12)(K), which is as follows:

> "Any teacher coming under the provisions of this section who has attained or shall attain the age of seventy years shall be retired by the managing body of the schools at the end of the school year in which the said teacher has reached the age of seventy * * *."

The decision and the judgment of the Court rests upon this amendment.

QUESTION PRESENTED

The case presents the question whether a statute of a state is valid which deprives a teacher of her position after she has had tenure for a long period of years and has voluntarily been a member of a retirement fund which made her tenure permanent during good behavior and into which she paid monthly contributions and when she has complied with all the other requirements of such retirement law.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

The Supreme Court of the State of Wisconsin, a court of last resort, has decided a federal question in a way in conflict with the applicable decisions of this Court.

Indiana ex rel. Anderson v. Brand, 303 U.S. 667, 58 S.C. 443, 82 L. Ed. 685.

Under the law of Wisconsin a contract exists and the decision of the Wisconsin Supreme Court constitutes an impairment thereof.

State ex rel. O'Neil vs. Blied, 188 Wisconsin 442.

State ex rel. Dudgeon vs. Levitan, 181 Wisconsin 326.

State ex rel. Nyberg vs. Board of School Directors, 190 Wisconsin 570.

State ex rel. Karnes v. Board of Regents, 222 Wisconsin 542.

Wherefore, it is respectfully prayed that a writ of certiorari be issued out of, and under the seal of, this Honorable Court directed to the Supreme Court of the State of Wisconsin commanding that Court to certify

and send to this Court for its review and determination the full and complete transcript of the record and all proceedings in the case at bar, and that the judgment of the said Supreme Court of the State of Wisconsin may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as this Honorable Court may deem just and proper, and your petitioner will ever pray.

Respectfully submitted,

A. W. RICHTER,
Counsel for Petitioner.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

314-673

ELIZABETH MORGAN,
Petitioner,

vs.

MILTON C. POTTER, Superintendent of Milwaukee Public Schools of the City of Milwaukee,
Respondent.

No. 607

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

A. W. RICHTER,
Counsel for Petitioner.

HAMMERSMITH-KORTMEYER CO. MILWAUKEE

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

ELIZABETH MORGAN,
Petitioner,

vs.

MILTON C. POTTER, Superintendent of Milwaukee Public Schools of the City of Milwaukee,
Respondent.

No.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

I.

JURISDICTION

The jurisdiction of this Court is invoked under *Judicial Code,* Section 237, 28 U. S. C. 344.

The date of the final judgment of the Supreme Court of the State of Wisconsin is June 12, 1941. No petition for rehearing was filed.

The nature of the case and the rulings below bring the case within the jurisdictional provisions of Section 237, 28 U. S. C. 344.

The following case among others sustains the jurisdiction of this Court:

> *Indiana ex rel. Anderson vs. Brand,* 303 U. S. 95, 82 L. Ed. 685, 58 S. C. 443.

II.

STATEMENT OF THE CASE

Petitioner, who had been a teacher in the public schools of Milwaukee for 50 years, was removed by respondent in 1939.

In 1909 the first teacher's retirement and pension law in Wisconsin, applicable to Cities of the first class, was passed, Chap. 510, Laws of Wis. 1909, now Sec. 42.55 (18) Wis. Statutes. The provision of this law (17) which governs the case appears in the petition, page 3. It appears in substantially its original form in Section 42.55, Statutes of Wisconsin.

As to all teachers in the service at the time of the passage of the act, membership in the pension fund provided by it was voluntary. As to all teachers obtaining employment after the passage of the act, membership was automatic.

Petitioner filed her voluntary consent and thereby came under the act and made the required monthly payments of $2.00 per month.

Petitioner was removed from the service under an amendment to Section 42.55 of the Statutes passed in 1937 and designated 42.55 (12) (K) which is set out in

the petition, page 4, and which provides for the mandatory retirement of every teacher upon reaching the age of 70 years.

The foregoing facts are undisputed and it is admitted and also undisputed that petitioner was efficient and of good behavior and that she was not removed for cause.

III.

OPINION BELOW

The Supreme Court of Wisconsin decided that the act of 1937, Section 42.55 (12) (K) was intended to be retroactive and to apply to all teachers in the service prior to its enactment. Therefore, it was held to apply to petitioner. It held further that the act of 1909, 42.55 (18), while making the employment of the teacher permanent, did not create a contract.

SPECIFICATION OF ERRORS

The Supreme Court of Wisconsin erred:

1. In sustaining the judgment of the Circuit Court of Milwaukee County.

2. In deciding that there was no contract between petitioner and the City of Milwaukee.

ARGUMENT

I.

Elements of Contract Present

The act of 1909 upon which petitioner bases her claim, now Section 42.55 (18) of the Statutes of Wisconsin, provided for voluntary membership in the pen-

sion and retirement fund by teachers in the service at the time of its passage. It, therefore, held out an offer to all teachers then in the service to accept its provisions or not as they saw fit. Upon acceptance they assumed certain obligations, among them being the payment of monthly contributions, and they were given certain benefits. There is, therefore, present the fundamental basis of contract; an offer which ripens into a contract by acceptance and then forms a bilateral obligation.

Petitioner accepted the offer and bound herself to perform the contract on her part. It is undisputed that she did so perform by rendering services as required as a teacher and by paying the requisite contributions over a long period of years.

It is submitted therefore, that notwithstanding the absence of the word contract the essence of the relation is present. Therefore, the decision of this Court in *Indiana ex rel. Anderson vs. Brand,* 303 U. S. 95, is applicable. Here as there, the legislature by the act of 1909 announced a new policy and held out to teachers who chose to come under the law that their employment would be permanent. A teacher who accepted the provisions of the act did so in the expectation that, if she performed her obligations under the contract and made her payments under the laws, she would have a right to a permanent position. Certainly it cannot be reasonably said that when she so accepted she expected that the legislature might at any time and for any reason terminate her contract. Therefore, it is submitted that the decision of the Supreme Court of Wisconsin is erroneous because it disregards and misinterprets the very nature of the law and the action of the parties.

II.

The State of Wisconsin Interpreted the Law as a Contract

From the very first decision upon the Statute the Supreme Court of Wisconsin has interpreted it as creating contractual rights.

State ex rel. Dudgeon v. Levitan, 181 Wis. 326.

State ex rel. O'Neil v. Blied, 188 Wis. 442.

State ex rel. Nyberg v. School Directors, 190 Wis. 570.

State ex rel. Karnes v. Board of Regents, 222 Wis. 542.

State ex rel. Mellen v. Teachers, etc., 185 Wis. 653.

It had, therefore, been the law of Wisconsin for a long period of years prior to petitioner's removal that the law under which she held her position gave her contractual rights. Every teacher who accepted employment under the act of 1909 after the decisions of the Supreme Court did so in reliance upon the announced statement of the State of Wisconsin that a contract was being entered into between the teacher and the City.

Even as late as this year the Supreme Court of Wisconsin, while holding that another act which provided for permanent employment as to teachers in schools other than in cities of the first class did not create contractual obligations, held that a teacher's retirement act was intended to create a contract. Thus in

Morrison v. Board of Education, — Wis. —, 297 N. W. 386,

the Court said in, deciding a case not based on a pension or retirement law,

> "The Teachers' Retirement Act sufficiently evidences a purpose to create contractual rights in teachers."

Thus the Supreme Court of Wisconsin, as late as April 15, 1941, was of the opinion that the law in question here created contractual rights. It is submitted that under Article I, Section 10 of the Constitution of the United States the Supreme Court of Wisconsin could not hold to the contrary in the present case without impairing the obligations of petitioner's existing contract.

It is therefore submitted that upon the undisputed facts the discharge of petitioner was in violation of a contract; that the intent to create a contract is clear from the provisions of the act in question and that the interpretation and construction by the Supreme Court of the State of Wisconsin to the effect that the act did create contractual obligations made it unconstitutional for the State of Wisconsin to abrogate the rights of petitioner violated Article I, Section 10 of the Constitution of the United States. Therefore, it follows that petitioner's constitutional right has been violated.

It is, therefore, respectfully submitted that the writ of certiorari should be granted as prayed for and the decision of the Supreme Court of Wisconsin should be reviewed.

Respectfully submitted,

A. W. RICHTER,
Counsel for Petitioner.

Office - Supreme Court, U. S.
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In The

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vs **No. 607**

MILTON C. POTTER, Superintendent of Milwaukee Public Schools of the City of Milwaukee,

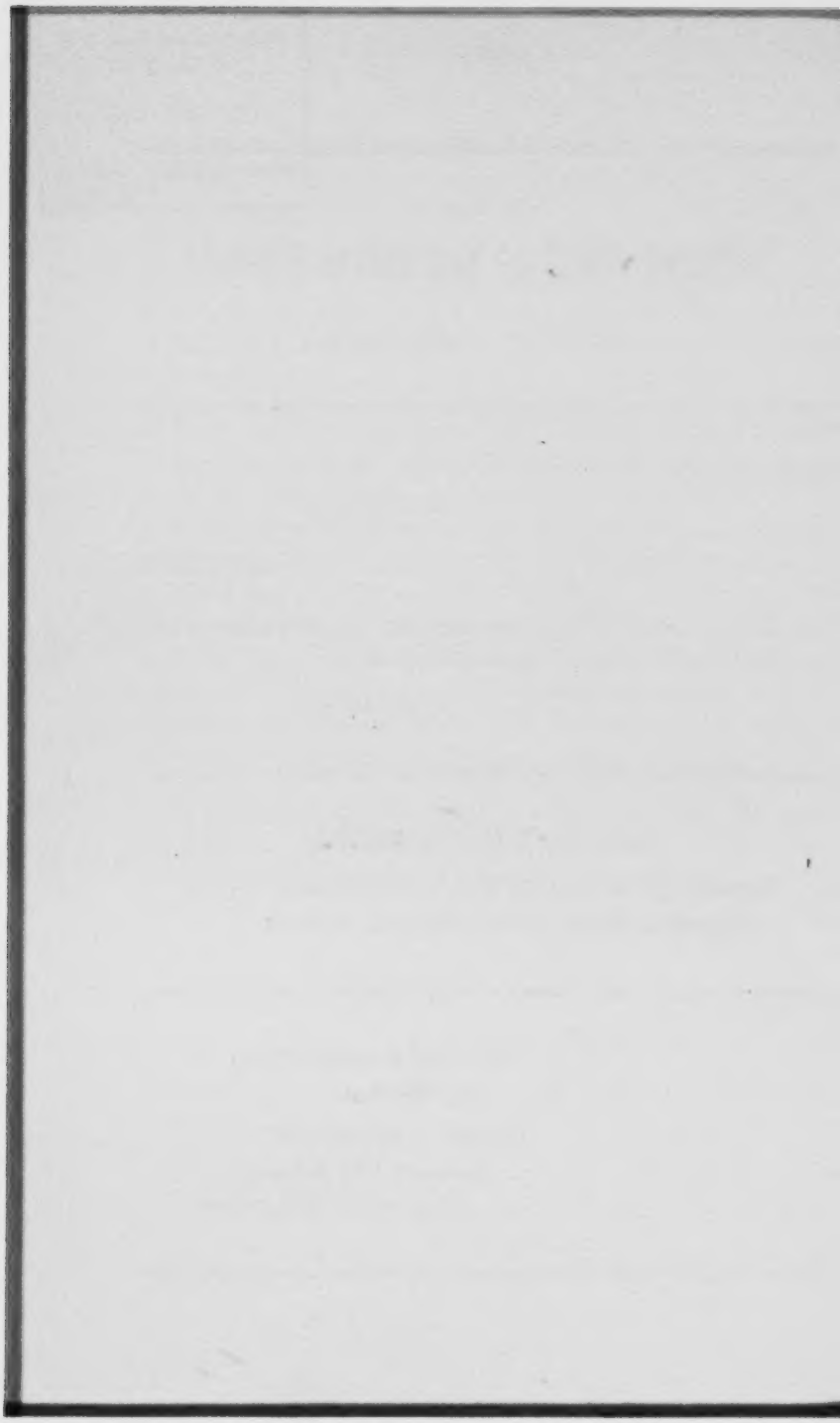
Respondent.

RESPONDENT'S BRIEF

Opposing Petition for Writ of Certiorari to the Supreme Court of the State of Wisconsin.

WALTER J. MATTISON,
City Attorney,

OMAR T. McMAHON,
Assistant City Attorney,
Counsel for Respondent.



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MILTON C. POTTER, Superintendent of Milwaukee Public Schools of the City of Milwaukee,

Respondent.

RESPONDENT'S BRIEF

Opposing Petition for Writ of Certiorari to the Supreme Court of the State of Wisconsin.

The decision and judgment are officially reported in *Elizabeth Morgan vs. Milton C. Potter,* 298 N. W. 763 (decided June 12, 1941) (R. 105).

STATEMENT OF THE CASE.

Petitioner was a teacher in the Milwaukee Public schools from September, 1889 to June, 1939, became 70 years old October 5, 1938 and was retired by the board of school di-

rectors of the city of Milwaukee in June, 1939, the end of the 1938-1939 school year, during which she attained the age of 70, and commenced mandamus action for reinstatement in her teaching position (R. 105). The trial court entered judgment dismissing her petition, quashing the alternative writ and denying the peremptory writ (R. 60). The supreme court of the State of Wisconsin, the highest court in the state, affirmed the trial court judgment upon the grounds set forth in the written opinion (R. 105-110).

In 1909 petitioner became a member of the Milwaukee Public School Teachers' Annuity and Retirement Fund, administered by a board of trustees, created and maintained by the provisions of old section 925xx of the Wisconsin Statutes, renumbered years ago and now constituting Section 42.55. Old subsection (17) of Section 925xx, the tenure provision, is now subsection (18) of Section 42.55 of the Statutes and is set forth on pages 3 and 4 of the petition herein, the only change since the original enactment of the statute having been to reduce the required years of probation teaching before attaining permanent tenure from four to three. Petitioner became entitled to a $500.00 annual pension after the termination of her services (R. 54, 106).

She was retired by the school board pursuant to the provisions of Section 42.55 (12) (k) of the Wisconsin Statutes of 1939, enacted by chapter 160 of the Laws of Wisconsin for 1937, set forth on page 4 of the petition.

In the state courts petitioner asserted that Section 42.55 (12) (k) was invalid as impairing the obligations of her alleged indefinite lifetime teaching contract under Section 42.55 (18), in violation of the constitutional privileges, Article I, Section 12, Wisconsin Constitution, and Article I, Section 10, United States Constitution (R. 108).

QUESTION PRESENTED.

Whether the Wisconsin tenure statute, Section 42.55 (18) of the 1939 Statutes (formerly Section 925xx (17)) granted to petitioner a statutory contract during efficiency and good behavior for life, which could not be impaired by the enactment of Section 42.55 (12) (k) providing for the compulsory retirement of teachers at the age of 70 years, that is, whether the 1937 compulsory seventy year retirement statute violates any right of petitioner under Article I, Section 10, of the United States Constitution.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

The petition assigns the following reasons:

1. That the Wisconsin Supreme Court decided the federal question involved in a manner in conflict with the applicable decisions of this court.

2. That petitioner under Wisconsin law had a lifetime contract which the legislature could not terminate at the age of seventy and the Wisconsin Supreme Court decision constitutes an impairment of such alleged contract.

In effect the petitioner in her brief urges that her case is controlled by the decision of this court in *Indiana ex rel Anderson vs. Brand,* 303 U. S. 95, 58 S. Ct. 443, 82 L. Ed. 685, and not by the decisions of this court in *Dodge vs. Board of Education,* 302 U. S. 74, 58 S. Ct. 98, 82 L. Ed. 57 (involving the Illinois statute retiring Chicago tenure teachers at sixty-five) and *Phelps vs. Board of Education, etc.,* 300 U. S. 319, 57 S. Ct. 483, 81 L. Ed. 674, (involving the right of a school board under the New Jersey tenure statute to de-

crease teachers' salaries as against the teachers' claim they had a contract that prohibited reduction).

Argument in Opposition to Petition for Certiorari.

I.

Petitioner had no lifetime contract with the City of Milwaukee or its School Board.

The undisputed facts are that petitioner had never in 1889 or thereafter executed a written contract with the City of Milwaukee or its board of school directors, and no Milwaukee teachers had signed teaching contracts since 1908 (R 73, 78). Petitioner at the trial conceded no such contract had been signed (R. 66).

There was no mutuality of contract insofar as the teaching period was concerned. Miss Morgan, after having obtained permanent employment or indefinite tenure, was free to quit voluntarily any time she pleased. The school board could not compel her to continue teaching if she wished to retire at any time during her fifty years of services. The city could not recover damages for any alleged breach of contract by reason of her having refused any demand of the city that she continue teaching (R. 109). Contracts pursuant to statutory provisions are not favored. They are not implied. One must establish any such statutory contract clearly and unmistakably. Whoever asserts a legislative contract has the burden of establishing it. The relationship between Milwaukee teachers and the city, represented by its school board, under the tenure statute, is that of "legislative status," indefinite as to duration, but

always subject to legislative modification or repeal, as a declaration of state public policy. The grant of indefinite tenure under section 42.55 (18) was a legislative gratuity, petitioner not having paid any consideration for such grant (R. 108-109). The essential elements of a contract are absent.

Morgan vs. Potter, supra;
Morrison vs. Board of Education, 297 N. W. 383 (Wis. 1941);
Taylor vs. Board of Education of San Diego, 89 P. (2d) 148 (Cal. 1939);
Campbell, et al. vs. Aldrich, et al., (3 cases) 79 P. (2d) 257 (Oregon 1938).

II.

The Case is not ruled by Indiana ex rel Anderson vs. Brand.

The decision of *Indiana ex rel Anderson vs. Brand, supra,* is inapplicable and distinguishable from the case at bar and merely holds that the Indiana legislature had granted a contract to the Indiana teachers, which was within the protection of the provisions of the Federal Constitution forbidding impairment of contracts by state action; that the Indiana legislature had the power to adopt a policy of teacher contracts if it saw fit to do so; that there was no doubt about the existence of the Indiana teaching contracts; that the relatrix, Miss Anderson, having become a permanent teacher, under the teachers' tenure law, had a vested property right in her indefinite lifetime contract which could not be impaired by repeal of the statute; that the Indiana statute was not a mere declaration of public policy, subject to modification or repeal by successor legislatures. The 1899 Indiana Act required written contracts

to be executed between teachers and the local school corporations. The 1921 statute amplified the requirements in respect to teaching contract provisions and the 1927 legislature adopted the teachers' tenure act in question. The 1927 tenure statute provided that the then existing teacher contracts, upon the expiration of the stated terms, should be deemed to continue in effect for an indefinite period; should be known as indefinite contracts and should remain in force unless succeeded by new contracts or cancelled for cause as provided in the tenure act. A teacher could not cancel a contract during the school term nor for a period of 30 days previous to the beginning of any term (unless by mutual agreement) and the teacher could cancel only upon 5 days' notice. The 1933 amending act attempted to take township school corporations out of the 1927 tenure act, which the Indiana Supreme Court construed as repealing the 1927 tenure act in townships and leaving the township school authorities free to terminate the employment of teachers. The title of the Indiana Act was couched in terms of contract. It speaks of the making and cancelling of indefinite contracts. In the body of the act the word, "contract," appears 25 times. This court in its opinion says further that the tenor of the act indicates that the word "contract" was not used inadvertently or in any other than its usual and legal meaning and then distinguishes the Indiana case from *Phelps vs. Board of Education* and *Dodge vs. Board of Education, supra.*

III.

This Case is ruled by Phelps vs. Board of Education and Dodge vs. Board of Education.

Section 42.55 (18), the Wisconsin tenure provision is wholly silent as to the word "contract." So are old Section 925xx (17) and Section 42.55 (12) (k). The word "contract" does not appear at all in these tenure provisions. These provisions indicate no intention upon the part of the Wisconsin legislature to grant or establish an indefinite lifetime contract. All Milwaukee teachers, including petitioner, since 1909, the date of the enactment of the tenure statute, knew, or were charged with the knowledge, that the legislature might from time to time enact amendments, including such as Section 42.55 (12) (k).

There was nothing arbitrary or unreasonable about the 1937 compulsory retirement at seventy provision. The legislature well knew that the average teachers commenced to teach at the age of about twenty-four and would have about forty-six years of teaching before compulsory retirement. The length of service and time of retirement are matters of public policy in the educational field, wholly within the domain and plenary powers of the legislature for determination in the interests of the public welfare.

Section 42.55 (18), properly construed, is an inhibition on the school board to dismiss teachers arbitrarily without cause, and never was intended to grant indefinite lifetime contracts. On the other hand, Section 42.55 (12) (k) was a command by the legislature upon the school authorities to retire teachers at 70.

The Wisconsin statute is similar in content and purport to the Illinois statute before this court in *Dodge vs. Board of Education, supra,* and the New Jersey statute before this court in *Phelps vs. Board of Education, supra;* and to that of California before the California courts in *Taylor vs. Board of Education of San Diego, supra;* and is very similar to the Oregon statute before the Oregon courts in *Campbell vs. Aldrich, et al., supra,* which refers to "permanently employed" teachers, as does Section 42.55 (18) of the Wisconsin Statutes. We respectfully submit that the *Phelps* and *Dodge* cases rule the case at bar adversely to the petitioner herein.

It was conceded by respondent in the trial and on appeal below that petitioner had an "annuity contract" which entitled her to an annual pension after retirement by reason of her having paid the monthly amounts prescribed by the annuity provisions of the statute, but the annuity provisions of Section 42.55 as a whole are separable from and independent of the retirement provision, Subsection (18) (R. 108), there being no contract in respect to a period of indefinite or lifetime service, but only in respect to the annual annuity or pension, as held by our Wisconsin Supreme Court in its opinions in the instant case and in *Morrison vs. Board of Education, supra.* Miss Morgan had a vested right in her annuity or pension, but no vested right to such indefinite or lifetime employment either before or after the adoption of Section 42.55 (12) (k) in 1937 (R. 106).

IV.

Petitioner erroneously relies on earlier Wisconsin decisions as holding she had a vested contract.

Petitioner erroneously relies on *State ex rel. Dudgeon vs. Levitan,* 181 Wis. 326, 193 N. W. 499 (1923); *State ex*

rel Mellen vs. Teachers' Annuity and Retirement Fund Trustees, 185 Wis. 653, 201 N. W. 383 (1924); *State ex rel O'Neil vs. Blied,* 188 Wis. 442, 206 N. W. 213 (1925); *State ex rel Nyberg vs. School Directors,* 190 Wis. 570, 209 N. W. 683 (1926); and *State ex rel Karnes vs. Board of Regents,* 222 Wis. 542, 269 N. W. 284 (1936). All these cases were considered by the Wisconsin Supreme Court on the appeal. They all antedate the adoption of Section 42.55 (12) (k) in 1937.

In *Morgan vs. Potter,* 298 N. W. 763, the case at bar, the Wisconsin Supreme Court grounded its decision on the cases of *Dodge vs. Board of Education, supra,* and *Morrison vs. Board of Education, supra,* decided April 15, 1941 (R. 108-109).

In the *Morrison* case at pages 386-7 the Wisconsin Supreme Court states in reference to the *Nyberg* case, the *O'Neil* case, and by implication the *Dudgeon* case:

> "Insofar as the opinion intimates that the legislature could not have changed the permanent employment features of this retirement act, it goes further than is necessary for its holding. Obviously, if the statute confers permanent tenure, a school board cannot destroy the tenure whether a subsequent amending statute can do so or not. That is all that was involved in the case, and hence we are not disposed to consider whether the dictum is correct as applied to the statute there involved."

In the *Karnes* case the Wisconsin Supreme Court merely held that under the tenure statute applicable to Wisconsin Normal School teachers, the Board of Normal Regents could not assign a teacher with permanent tenure to a certain named position in which his principal occupation

was that of teaching, and then effect his discharge *by subsequent action abolishing the position although continuing the work;* in effect that a teacher could be dismissed for cause only and not by subterfuge.

In the *Mellen* case the Wisconsin Supreme Court merely held that plaintiff by taking a leave of absence for about a year in 1920 and resigning as of September 1, 1921 did not separate herself from the service so as to disqualify her from being entitled to a pension which the defendant trustees had denied her. She was not suing for reinstatement, but for the annuity. The court, we believe, used the word "contract" in its opinion inadvisably, but the contract in issue there was the annuity contract and not the teaching contract.

The opinions in the *Morgan* and *Morrison* cases are the last words of the Wisconsin Supreme Court on the question of the non-existence of a contract that the legislature could not diminish. Being such last decisions, they expressly or impliedly overruled the prior *Dudgeon, O'Neil, Nyberg, Karnes* and *Mellen* cases, insofar as those cases held or intimated that a teacher had a lifetime contract beyond the reach of the legislature either under Section 42.55 (18), applicable only to teachers in cities of the first class (Milwaukee), or similar statutes applicable to teachers in the schools elsewhere in the state or in the State University or Normal Schools. Section 42.55 (18) does not constitute an indefinite lifetime contract between the Milwaukee teachers and the City of Milwaukee or its school board, but is a mere declaration of public policy which could validly be changed by the enactment of Section 42.55 (12) (k), as held in the *Morgan* and *Morrison* cases (R. 109).

It being clear that Miss Morgan had no enforcible lifetime contract, as claimed by her to exist under the Wiscon-

sin Statute in question, and our Wisconsin Supreme Court having held no contract exists, Section 42.55 (12) (k) providing for compulsory retirement at seventy, does not violate Article I, Section 10, of the United States Constitution.

CONCLUSION.

It is respectfully submitted that the case of *State of Indiana ex rel Anderson vs. Brand* is clearly inapplicable and distinguishable from the case at bar; that it does not rule the case at bar; that the case at bar is ruled on the federal constitutional question adversely to the petitioner by *Dodge vs. Board of Education* and *Phelps vs. Board of Education;* that the Wisconsin Supreme Court decision and judgment in *Morgan vs. Potter* is not in conflict with the law applicable as declared in the *Dodge* and *Phelps* cases, and that the writ of certiorari herein should be denied under the decisions and rules of this court.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

ELIZABETH MORGAN,
Petitioner,

vs.

MILTON C. POTTER, Superintendent of Milwaukee Public Schools of the City of Milwaukee,
Respondent.

No. 607

PETITIONER'S REPLY BRIEF

A. W. RICHTER,
Counsel for Petitioner.

HAMMERSMITH-KORTMEYER CO. MILWAUKEE

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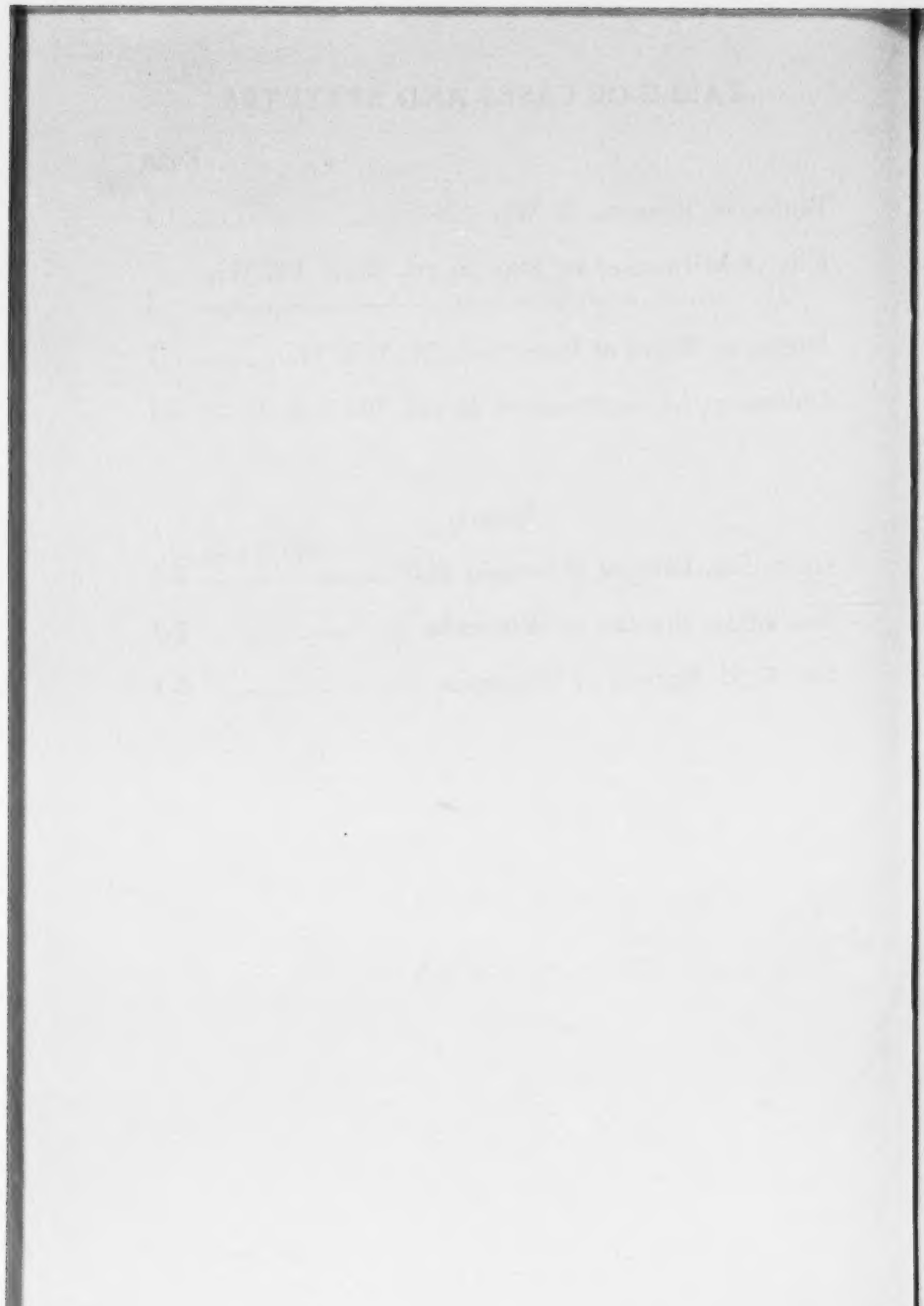

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RESPONDENT'S CONTENTION UNTENABLE

Respondent contends that because no written contracts were made with teachers by the City of Milwaukee, there was no contract.

The doctrine of *Indiana ex rel. Anderson v. Brand,* 303 U.S. 95, is not based upon the presence or absence of a written contract. Since 1889, petitioner was employed by the City of Milwaukee, upon an oral contract and so were all other teachers in the City of Milwaukee.

Respondent contends further that there was no contract because the word contract was not used in the legislation, and because it was not necessary for petitioner

to do any act to obtain the rights given her by the tenure statute.

The decision in *Indiana ex rel. Anderson v. Brand* is not based upon mere terminology in the statute. It is based upon the fact that the elements of contract were present and the intent of the legislature to give contractual rights were clear.

The statement that petitioner was not required to do any act to obtain her rights under the tenure law is incorrect. The Teachers Retirement and Tenure Law is Chapter 510 of the Laws of Wisconsin of 1909.

The language of this Act, in paragraph 2 thereof, is:

> "All teachers employed in the public schools of such cities at the time of the organization of said Board, desiring to come under the provisions of this *Act,* shall file a written application therefor and consent thereto with the Superintendent of Schools."

Chapter 510, of the Laws of 1909, became Section 925xx of the Statutes, and the word "Act" was changed to Section. Section 925xx was a single section of the Statutes with a number of sub-sections. It was later changed to Section 42.55 (R. 107 footnote) of the Statutes and appears thus in the present Statutes of Wisconsin. Section 42.55 is also a single section with several subsections. The word "Section" in the place of "Act" was continued in Section 42.55.

It is clear that the word "Act" in Chapter 510 and the word "Section" in 925xx and in 42.55 referred to and was intended to refer to the entire Statute. Clearly, therefore, the statement of the Supreme Court of Wisconsin, (R. 106) as follows:

> "The provision required no act on the part of the plaintiff prerequisite to acquisition of tenure rights as she had taught more than four years when the Act went into effect,"

is erroneous. The original Act provided, as does the present Statute, that petitioner and any teacher:

> "who desires to avail himself of the rights and benefits conferred and to assume the limitations and assessments imposed by this Section shall file a written application therefor and consent thereto."

Therefore, it was necessary for petitioner to voluntarily consent to come under the Act and to assume the obligations imposed by it. These obligations included the agreement to pay monthly contributions into the fund.

The tenure provision was Section 17 of the original Act (R. 106), and became Sub-section 17 of 925xx, and (18) of Section 42.55.

It is submitted that Chapter 510, Laws of 1909, clearly indicated the intent of the legislature to offer a contract to teachers then in the service. The element which was absent in *Dodge v. Board of Education,* 302 U.S. 74, referred to by this Court in *Indiana ex rel. Anderson v. Brand,* 303 U.S. 95, 107, that is, that the Statute did not bind the teacher to the payment of retirement annuities, was and is present here.

Furthermore, the State of Wisconsin had, through its Supreme Court, announced to teachers and to the world long prior to 1909, that the relationship of the teacher with the governmental subdivision employing it was one of contract.

> *Butler v. Regents,* 32 Wis. 124 (1878).
>
> *City of Milwaukee, Board of Education v. State ex rel. Reed,* 100 Wis. 455 (1898), 76 N.W. 351.

Therefore, it is clearly not true, as respondent argues, (Respondent's Brief 7), that all Milwaukee teachers knew or were charged with the knowledge that the legislature might from time to time enact amendments.

It is also clear that the legislature in enacting Chapter 510 of 1909 had in mind creating contractual rights.

The fact that the teacher was not bound to any particular term of service does not indicate the absence of contract as respondent argues. The offer was held out to teachers then in the service to voluntarily accept Chapter 510 of 1909, including the pension and tenure provisions, and it was agreed by the Act that if they performed by continuing to teach and by paying their monthly contributions, they would have the rights under the Act, including pension and tenure.

Contracts such as that inherent in the Statute are common among private employers. It is not unusual for an employer to offer permanency of tenure and other benefits to an employee provided he shall continue to serve such employer. Certainly, the absence of the additional obligation to continue to serve for a definite period could not destroy such a private contract.

Certainly, an employee who had accepted an offer, such as that contained in Chapter 510 of 1909, and had performed by giving service and making the contributions for fifty years would not be denied relief by any court.

Therefore, the Act of the State of Wisconsin in attempting to abolish without cause petitioner's right to continue in the service is not a mere change of legislative policy as respondent argues, but is nothing other than repudiation of its contractual obligation.

Respectfully submitted,

A. W. RICHTER,
Counsel for Petitioner.